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5 UNITED STATES DISTRICT COURT
6 WESTERN DISTRICT OF WASHINGTON AT TACOMA

7 SAFECO INSURANCE COMPANY OF
8 AMERICA,

9 Plaintiff,

10 vs

11 FIDELITY NATIONAL TITLE INSURANCE
12 COMPANY,

13 Defendant.

NO. 3:19-CV-05902-DWC

AMENDED MOTION TO CONTINUE
TRIAL DATE AND PRETRIAL
DEADLINES

14 Defendant Fidelity National Title Insurance Company (“Defendant” or “Fidelity”)
15 respectfully moves the Court to continue the dates set in the Initial Pretrial Scheduling
16 Order at least 120 days. There is no trial date set in this matter presently, but Fidelity
17 seeks at least 120 additional days on all pretrial dates set now on the Initial Pretrial
18 Scheduling Order relating to discovery, dispositive motions, mediation and trial/trial
19 filings. This Amended Motion is only filed to clarify a background fact learned since
20 filing of the original Motion. Plaintiff has been made aware and consented to the
21 amendment. Womac Decl., ¶ 13.

22
23 **A. Factual and Procedural Background**

24 This is a recoupment case by Safeco Insurance Company of America (“Safeco” or
25 “Plaintiff”) against Fidelity for legal costs and attorneys’ fees allegedly spent by Safeco

AMENDED MOTION TO CONTINUE TRIAL DATE
AND PRETRIAL DEADLINES - 1

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1 defending its insureds, Scott and Debra Dalglish (the “Dalglishes”). Beginning in
2 2016, the Dalglishes were embroiled in litigation with two other neighbors in a dispute
3 concerning certain real properties located in Hansville, Kitsap County. The litigation
4 was titled *Jensen, et al, v. Erickson, et al and Erickson v. Dalglish*, and filed under
5 Kitsap County Superior Court Cause No. 16-2-00712-2 (the “Lawsuit”).
6

7 Having been named in the Lawsuit as third-party defendants by their neighbors,
8 the Ericksons, the Dalglishes tendered claims to both their title insurance carrier
9 (Fidelity) and home insurance carrier (Safeco) for a defense in the Lawsuit. In June
10 2016, Fidelity declined coverage and was unable to provide a defense since the matters
11 in the Lawsuit were expressly excepted from coverage under the title policy. Safeco later
12 accepted coverage under its home owners’ policy, and provided a defense in the Lawsuit,
13 which was ultimately settled while an appeal was pending.
14

15 After the conclusion of the Lawsuit, Safeco entered an agreement with the
16 Dalglishes for the sole and express purpose of Safeco pursuing recovery of its alleged
17 legal costs and fees expended in the Lawsuit. Declaration of Daniel A. Womac (“Womac
18 Decl.”), **Exhibit A**. Safeco commenced this litigation against Fidelity on September 25,
19 2019 seeking (1) Declaratory Relief for a finding that Fidelity owed the Dalglishes a
20 duty to defend them in the Lawsuit (a prerequisite to Safeco being entitled to any relief)
21 and (2) for Equitable Contribution for a share of Safeco’s alleged defense costs in the
22 Lawsuit. Womac Decl., **Exhibit B**. Fidelity has denied in its Answer that Safeco is
23 entitled to relief under either claim in the instant litigation, and stated affirmative
24 defenses. Womac Decl., **Exhibit C**.
25

1 Safeco served initial disclosures to Fidelity on or about November 26, 2019.
 2 Womac Decl., **Exhibit D**. Fidelity served initial disclosures to Safeco on or about
 3 December 4, 2019. Womac Decl., **Exhibit E**.

4 Plaintiff and Defendant prepared and filed an Initial Pretrial Scheduling Order
 5 (the “Scheduling Order”) for this case on December 6, 2019. Womac Decl., **Exhibit G**.
 6 The Scheduling Order set a discovery cutoff date of June 5, 2020, discovery motion
 7 deadline of May 4, 2020, a dispositive motion deadline of June 12, 2020, and mediation
 8 deadline of July 3, 2020. *Id.* Those dates were all agreed upon before either party had
 9 knowledge of the impact of safety measures and responses to the COVID-19 pandemic.
 10

11 In early March 2020 Plaintiff and Defendant attempted to set a tentative date for
 12 mediation of the instant litigation to take place in late April, 2020. Womac Decl., ¶ 7.
 13 While the parties attempted to engage in informal discovery to reduce costs as they
 14 awaited mediation, both parties agreed summary judgment motions would follow a
 15 mediation and inquiries were made to the Court about available dates for hearings.
 16 Womac Decl., ¶ 8.
 17

18 On March 6, 2020, right in the middle of setting a mediation date and during the
 19 informal discovery discussions, this Court issued General Order Nos. 02-20 and 02-20
 20 (the “Orders”) in response to the growing COVID-19 pandemic, continuing all civil
 21 matters that cannot be resolved without oral argument. Womac Decl., **Exhibit F**. The
 22 Orders have since been replaced by General Order Nos. 03-20, 04-20, 07-20 and 08-20
 23 continuing the closure of this Court through July 31, 2020 consistent with the State of
 24 Washington’s Stay Home, Stay Safe Order as a result of COVID-19. *Id.* The Orders have
 25 greatly impacted the parties’ ability to abide by the scheduling dates agreed to in

1 December 2019, long before anyone could have imagined the impacts of the Covid-19
2 Pandemic.

3 Despite the impact of the Orders, the parties still pushed forward, to the extent
4 possible, with discovery. With mediation temporarily canceled, on April 14, 2020,
5 Fidelity sent Plaintiff a First Set of Interrogatories and Requests for Production. Womac
6 Decl., ¶ 11. On May 4, 2020, Fidelity sent Plaintiff First Requests for Admission.
7 Womac Decl., ¶ 12. At the time of initial filing of this Motion, the undersigned had
8 received no responses to any discovery demands. *Id.*, ¶ 13. However, upon being served
9 copies of this Motion, Plaintiff's counsel informed the undersigned that she had already
10 sent responses to the First Set of Interrogatories and Requests for Production on May
11 14, 2020. *Id.*, ¶ 13. Since the parties have an agreed E-Service Agreement in place, the
12 Responses were emailed but routed by Fidelity's corporate IT team to a 14-day email
13 quarantine protecting against phishing and fraudulent emails. *Id.*, ¶ 13. As a result, the
14 email and Responses were not received by the undersigned on May 14. *Id.*, ¶ 13.
15 Counsel for Plaintiff has since forwarded the Responses by email, having resent them on
16 May 30. *Id.*, ¶ 13. Additionally, after filing of this Motion, Plaintiff sent Supplementary
17 Responses to the First Set of Interrogatories and Requests for Production, and
18 Responses to the First Requests for Admission. *Id.*, ¶ 13. Fidelity has not had adequate
19 time to review all the Responses to the Requests, but is concurrently preparing a motion
20 to Compel Discovery on the Requests for Admission, finding them evasive and
21 incomplete. *Id.*, ¶ 13. Plaintiff has been made aware and consented to the amendment
22 to the motion and declaration. *Id.*, ¶ 13.
23
24
25

1 In light of the current conditions and considering its request to Plaintiff for a
 2 stipulated continuance, Fidelity has not yet made any motion to compel discovery.
 3 Womac Decl., ¶ 14. Plaintiff sent a Request for Production of Documents to Fidelity on
 4 or about May 6, 2020, two days after the deadline in the Scheduled Order for any
 5 discovery motions. Womac Decl., ¶ 15. Fidelity is preparing responses to those requests
 6 presently. *Id.*, ¶ 16.

8 On May 27, 2020 Fidelity asked Safeco counsel for an agreed stipulation to a
 9 continuance of the discovery, dispositive motion and trial deadlines due to the
 10 unforeseeable delays caused by COVID-19. Fidelity was told the stipulation would not
 11 be recommended to Safeco. Womac Decl., ¶ 17.

12 **B. Argument**

13 1. Legal Standard

14 Courts have broad discretion to control their own docket, *Clinton v. Jones*, 520
 15 U.S. 681, 706 (1997), and a court may extend the deadlines set forth in its docket for
 16 good cause. Fed. R. Civ. P. 6(b). “The decision to grant or deny a requested continuance
 17 lies within the broad discretion of the district court, and will not be disturbed on appeal
 18 absent clear abuse of that discretion.” *United States v. Flynt*, 756 F.2d 1352, 1359 (9th
 19 Cir.), *amended*, 764 F.2d 675 (9th Cir. 1985). “There is no abuse of discretion unless the
 20 denial was arbitrary or unreasonable.” *United States v. Moreland*, 622 F.3d 1147, 1158
 21 (9th Cir. 2010) (internal citation and quotations omitted). Here, Fidelity’s request for a
 22 continuance of the dates set in the Initial Pretrial Scheduling Order is reasonable and
 23 based on the unforeseeable discovery challenges posed by the COVID-19 outbreak.
 24
 25

1 The Ninth Circuit considers four factors in deciding motions to continue the trial
 2 date: 1) the requesting party's diligence in preparing prior to trial; 2) whether delaying
 3 the trial would satisfy the need for the continuance; 3) the inconvenience to the court,
 4 the opposing party, and witnesses; and 4) the extent that the requesting party would
 5 suffer harm absent the continuance. *See United States v. Zamora-Hernandez*, 222 F.3d
 6 1046, 1049 (9th Cir. 2000); *United States v. Tham*, 960 F.2d 1391, 1396 (9th Cir. 1991);
 7 *Flynt*, 756 F.2d at 1359. "The fourth factor is the most critical." *Zamora-Hernandez*,
 8 222 F.3d at 1049; *see also Danjaq LLC v. Sony Corp.*, 263 F.3d 942, 961 (9th Cir. 2001)
 9 ("To meet this burden, the challenging party must meet a four-part test, the fourth (and
 10 mandatory) element of which requires a demonstration of prejudice."); *United States v.*
 11 *2.61 Acres of Land, More or Less, Situated in Mariposa Cty., State of Cal.*, 791 F.2d
 12 666, 671 (9th Cir. 1985) ("No one factor is dispositive...Absent a showing of prejudice
 13 suffered by the appellant, however, this Court will not disturb the ruling below."). As
 14 argued below, the instant circumstances meet this test head-on, since this case remains
 15 early in discovery, and in light of the COVID-19 challenges, neither party has had
 16 ample opportunity to set any depositions or complete the written discovery. The
 17 parties have worked well with each other thus far to accommodate each other's
 18 schedules and discovery will likely lead to setting a new date for mediation which
 19 serves judicial economy. This is the first request for a continuance of any dates,
 20 including the trial date, by any party in this case.

21 Moreover, the grant of a continuance where the risk of spreading infectious
 22 disease can be avoided by delaying a trial is reasonable and constitutes good cause. *See*,

1 *e.g., United States v. Allen*, 2012 U.S. Dist. LEXIS 123487, at *15–*16 (D.V.I. Aug. 30,
 2 2012) (continuing trial during chickenpox outbreak where travel could cause infectious
 3 public spread); *People v. Tucker*, 196 Cal. App. 4th 1313 (continuing trial where
 4 defendant was at risk of contracting “infectious disease” and a trial could expose “trial
 5 court personnel, jurors, and witnesses” to H1N1, a “debilitating and perhaps life-
 6 threatening illness”); *State v. Drewry*, 946 A.2d 981, 987 (Me. 2008) (continuing case
 7 where defendant under infectious disease quarantine); *People v. Goode*, 628 N.Y.S.2d
 8 727, 728 (N.Y. App. 1995); *State v. Ibarra*, Case No. 54736, 1988 Ohio App. LEXIS
 9 5256, at *2 (Ohio App. 1988).

11 2. Fidelity’s Preparation for Trial is Diligent

12 Since issuance of the initial 01-20 and 02-20 Orders, the reasonable safety
 13 measures undertaken against COVID-19 have concurrently made extremely impractical,
 14 if not impossible, any in-person discovery in this case. There is no way the parties could
 15 have foreseen in December 2019 that COVID-19 orders and restrictions on travel would
 16 hamper and prejudice discovery being accomplished by June 5, 2020, as set in the
 17 Scheduling Order. Had the parties known such complications were imminent, certainly
 18 they would have not given themselves only six months to complete discovery.
 19

20 Presently, the parties are engaged in mutual written discovery with the hopes of
 21 being able to schedule necessary depositions once travel restrictions are lifted and it is
 22 deemed safe. Further, following discovery the parties may wish to again attempt
 23 alternate dispute resolution. The current deadline for mediation per the Scheduling
 24 Order is July 3, 2020, but it is wholly unclear whether the parties will be able to
 25 complete depositions and discovery by that time.

1 And the parties are indeed actively and amiably pursuing discovery in this case.
2 With mediation temporarily canceled, on April 14, 2020, Fidelity sent Plaintiff a First
3 Set of Interrogatories and Requests for Production. Womac Decl., ¶ 11. On May 4,
4 2020, Fidelity sent Plaintiff First Requests for Admission. Womac Decl., ¶ 12. At the
5 time of initial filing of this Motion, the undersigned had received no responses to any
6 discovery demands. *Id.*, ¶ 13. However, upon being served copies of this Motion,
7 Plaintiff's counsel informed the undersigned that she had already sent responses to the
8 First Set of Interrogatories and Requests for Production on May 14, 2020. *Id.*, ¶ 13.
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12 Responses were not received by the undersigned on May 14. *Id.*, ¶ 13. Counsel for
13 Plaintiff has since forwarded the Responses by email, having resent them on May 30.
14 *Id.*, ¶ 13. Additionally, after filing of this Motion, Plaintiff sent Supplementary
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17 time to review all the Responses to the Requests, but is concurrently preparing a motion
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19 incomplete. *Id.*, ¶ 13. Plaintiff has been made aware and consented to the amendment
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24 In light of the current conditions and considering its request to Plaintiff for a
25 stipulated continuance, Fidelity has not yet made any motion to compel discovery.
Womac Decl., ¶ 14. Plaintiff sent a Request for Production of Documents to Fidelity on

1 or about May 6, 2020, 2 days after the deadline in the Scheduled Order for any
 2 discovery motions. Womac Decl., ¶ 15. Fidelity is preparing responses to those requests
 3 presently. *Id.*, ¶ 16. The responses to the above discovery demands, and reasonable
 4 written and testimonial follow-up discovery thereto, are instrumental to the
 5 development of Plaintiff's case and Fidelity's defenses to Plaintiff's claims.

6 3. Delaying the Trial Would Satisfy the Need for the Continuance

7 Here, the need for the delay is directly related to additional time for discovery for
 8 both sides. If the pre-trial dates are continued with the Court entering an Amended
 9 Schedule Order, the discovery deadline will be extended a reasonable amount of time
 10 permitting the parties to adequately respond to the pending written discovery, follow up
 11 with appropriate motions and supplementation, and schedule depositions, as needed, of
 12 relevant witnesses. Discovery is, without question, a useful purpose for a continuance.
 13

14 4. A Continuance Will Not Inconvenience the Court, Plaintiff or Witnesses

15 COVID-19 has inconvenienced, interrupted and generally frustrated American
 16 society, including our judicial system. The Orders make clear that this great Court
 17 remains shut to the public until July 31, 2020 at the earliest. While no trial has been set
 18 in this case, neither the parties nor the Court contemplated cancelation of most all
 19 settings in the docket for months at a time while the State of Washington's Stay Home,
 20 Stay Safe Order is in effect.
 21

22 Rather, a continuance in this case will likely serve to alleviate the Court's docket
 23 when matters begin to be rescheduled post-July 31. Moreover, Plaintiff will not be
 24 prejudiced since this matter is a recoupment case between two insurance companies,
 25 presenting no imminent or pressing demand for resolution that cannot wait an

1 additional reasonable time. Witness travel within Washington or to/from Washington
 2 is restricted under existing State mandates because of COVID-19, and no witnesses are
 3 inconvenienced by a reasonable set-over of the trial date.

4
 5 5. A Continuance Will not Unduly Prejudice Plaintiff, and the Denial of a
 6 Continuance Will Prejudice Defendant

7 If the dates are not continued, neither party will be able to complete adequate
 8 discovery in this case. Again, as stated above, there are multiple pending written
 9 discovery demands presently pending from both sides. The fact that the discovery
 10 demands were sent in April and May 2020 is both directly and indirectly related to the
 11 Orders and general restrictions on travel imposed and caused by COVID-19. As it
 12 stands, under the existing Scheduling Order, neither side can even file a motion related
 13 to discovery right now, even though both sides are presently preparing responses that
 14 may be objected to or demand Court intervention. Without responses to the written
 15 discovery, depositions cannot be scheduled. Both the written discovery and depositions
 16 are absolutely critical to the defenses in the litigation and without them, Defendant will
 17 most certainly be prejudiced.

18
 19 On the other hand, Plaintiff can claim no prejudice by a reasonable continuance
 20 of the current deadlines, since there is no need for urgency or expediency in this
 21 collection case for attorneys' fees already spent in defense of the Lawsuit. It is unknown
 22 whether any witnesses can travel for depositions anywhere in/out of the State of
 23 Washington for non-essential matters, which poses equal challenges to both sides and
 24 thus can't be deemed prejudicial to either. Completion of adequate and meaningful
 25 discovery further serves the purpose of rescheduling a mediation, something initially

1 canceled in this case specifically because of the COVID-19 outbreak and pending
2 discovery questions.

3 Defendant sought a stipulation from Plaintiff to continue the dates in the
4 Scheduling Order, but was advised it would not be recommended. Womac Decl., ¶ ____.
5 Counsel for each party in this case have worked well together thus far to accommodate
6 each other's conflicts, and this is the first request for a continuance made of the dates by
7 either party in this case.
8

9 **C. Conclusion**

10 For the foregoing reasons, Fidelity respectfully requests the Court grant at least
11 120 additional days on all pretrial dates set now on the Initial Pretrial Scheduling Order
12 relating to discovery, dispositive motions, mediation and trial/trial filings.
13

14
15
16 DATED: June 2, 2020.

17 FIDELITY NATIONAL LAW GROUP

18 s/Daniel A. Womac

19 Daniel A. Womac, WSBA #36394

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23 *Attorney for Defendant Fidelity National*
24 *Title Company*
25

CERTIFICATE OF SERVICE

I, Sasannah Dolan-Williams certify under penalty of perjury under the laws of The State of Washington that I am now and at all times herein mentioned, a citizen of the United States, a resident of the State of Washington, over the age of eighteen years, and not a party to or interested in the above-entitled action, and competent to be a witness herein.

On the date below, I served the following document on the following individuals in the manner indicated, as follows:

- MOTION TO CONTINUE TRIAL DATE AND PRETRIAL DEADLINES

Via E-Mail:

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Attorney for Plaintiff

DATED: June 2, 2020.

s/Sasannah Dolan-Williams

Sasannah Dolan-Williams

Litigation Paralegal